No. 14,316

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES GARRISON,

Appellant,

vs.

WARNER BROS. PICTURES, INC., a corporation,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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Statement of the Case.

The appeal herein involves two completely different claims: (a) a claim for an even million dollars as a reward and (b) a claim for attorneys' fees and costs asserted to be payable under Rule 37(c) of the Rules of Civil Procedure based upon an assertion of partial falsity in the answer to one of many interrogatories.

The basic controversy concerns events occurring during the production of a motion picture called "The Flame and the Arrow" made in 1949 by Norma Productions, Inc. (not a party hereto) and distributed by appellee, and an asserted offer of a reward made during the publicity campaign of that picture.

The motion picture, which was viewed by the Trial Court, and is in evidence, depicts the adventures of a local hero of the Robin Hood type in his conflicts with his feudal lord, in a medieval Italian setting. The hero, "Dardo," is played by Burt Lancaster, a well known actor and a corporate officer of Norma Productions, Inc. [Tr. p. 113]. The action is violent and full of fights, chases

and rescues, with acrobatic feats portrayed in many places of the type made famous in the days of silent films by the late Douglas Fairbanks. The appellant himself was an "atmosphere player" or "extra" in the making of the picture [Tr. p. 147].

At or about the time the picture was released for exhibition in Los Angeles, a newsreel was also exhibited. This newsreel contained a shot or clip showing Lancaster with three local newspaper reporters counting a heap of money dollar by dollar. The narrator in introduction makes the statement quoted or paraphrased many times by appellant (Op. Br. pp. 5, 16, 22, 26, 29-30) that:

> "In Hollywood, Burt Lancaster counts the one million dollar reward offered by Warner Bros. to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in 'The Flame and The Arrow' ".

[Pltf. Ex. 6; Tr. p. 313]. The newsreel had been put out by a subsidiary of appellee and appellee had made arrangements for the clip or shot to be filmed by the newsreel company.

At about the same time an item appeared in the Los Angeles Mirror which appellant also quotes several times (Op. Br. pp. 4, 22, 26; see photo reproduction [Tr. p. 305]), the language used being that of the newspaper. There was also an unpublished press release [Ex. 4; Tr. p. 307]. Nowhere is it stated that Lancaster was the person photographed every time the character "Dardo" appeared on the screen, as appellant infers.

However, the issues of fact as to performance of "stunts" as tendered by appellant were limited to three episodes or scenes, identified throughout the record as (1) an escape over a roof, (2) a courtyard rescue and (3) a

duel. Only as to these three sequences did appellant claim that there were "stunts" in the picture which Lancaster had not personally performed.

The issues in the case are almost entirely factual and on each of such issues the Trial Court on adequate evidence has found against the appellant. These issues are (1) whether Lancaster did or did not do the three things above listed, (2) whether these were "stunts" and (3) whether in any case there was a contract between appellant and appellee which should be recognized and enforced by a court. Since the questions are mainly whether the findings against the appellant are supported by the evidence, detailed presentment of the facts will appear in connection with the specific points. The facts concerning or relevant to the claim for costs and fees under Rules 36 and 37(c) will be separately discussed.

The questions and the evidence are plain and clear, and do not involve, as appellant infers, any need to draw fine lines or to be technical in the meanings of terms. Appellee asserts Lancaster did do the "daring stunts" and that the three incidents on which appellant's entire claim rests were not only not "daring stunts" but were not stunts at all, and besides that Lancaster had actually done the two most important of these in any case. The evidence shows that Lancaster had been a circus acrobat for years and was by no means a false front. In the picture he did a great many spectacular and hazardous acts or feats and these are not only proved but are not questioned. At no time can it be assumed that Lancaster was merely being puffed or built up to something essentially different by mere press agentry—he was a real and bold acrobat doing difficult, dangerous and spectacular things, and this was proved.

ARGUMENT.

The question of first importance here is, we believe, the matter of what Lancaster did in the making of the picture and how it was done, assuming for the time that there had been an offer of reward accepted as appellant claims.

I.

The Record Supports the Findings and Conclusions of the District Court That Lancaster Did Do All the Stunts in Question Here.

The Trial Court found [Finding X, Tr. pp. 45-46] that Lancaster had actually performed all his daring stunts shown in the picture. It found that two specified shots or sequences in the picture had been actually performed by one Don Turner and not by Lancaster, but that neither of such episodes was a stunt and neither was daring nor dangerous. A third incident or sequence was held not to be a stunt and in addition it was found that the entire sequence was performed by Lancaster, although on the screen two minor shots of an arm and shoulder of Turner appeared [Tr. p. 46]. The sequences are described by the Court and are those on which appellant attempted to base his claim for reward.

The first of the episodes described in Finding X is a distant or long shot silhouette scene in which the character Dardo carries the character Rudi along the crest of a roof. The second is a courtyard scene in which the character Dardo rides a horse to a cart, stops the horse, steps onto the cart, cuts down the figure of another character who was being hanged and then drives the cart from the courtyard. The third is a dueling sequence between the character Dardo and the character Alessandro. The

actual Finding on this latter sequence is that it was entirely performed by Lancaster as shown on the screen, with the exception of two shots which showed a portion of the shoulder and arm of a "double" for Lancaster [Tr. p. 46].

These findings are fully supported by the record. Lancaster himself was a witness and also the other actors who were directly involved. There is no conflict. Appellant in his Opening Brief indicates and quotes the testimony on direct examination of the witness Turner (Op. Br. pp. 11-16) as constituting proof that Lancaster did not do all of the stunts he was represented as doing. The incidents on which Turner was questioned and to which he made replies are the three above mentioned and on which there are specific findings. Turner's testimony as quoted is only a part of his testimony, and is only a small part of the evidence relating to the episodes.

The picture in evidence is a normal feature length photoplay and includes much strenuous action, a great deal of which is done by the character Dardo. The part of Dardo was played by Lancaster. In the full length of the picture, therefore, only the three episodes or sequences mentioned are in any way in issue and these must be considered somewhat in detail.

(a) The First Episode.

Here one character carries another along the apparent crest or peak of a roof. That roof was part of a motion picture set and a sketch showing a cross section of the structure is in evidence as defendant's Exhibit A [Tr. p. 390]. It was also described by witnesses [Tr. pp. 175, 220, 248-249]. As in other motion picture sets, only the part actually showing in the picture is normal, that is, this

set like most sets is merely a front. As shown by the sketch, the front portion of the roof appeared as a steep gable running to a crest 24 feet from the ground. In the photoplay the building seems to be a normal front and a normal pitched roof. Along the crest or the apparent peak of the roof on the side away from the camera, there was scaffolding. Right at the apparent peak and running lengthwise was a 2 foot path or platform made of 2 x 12 inch timbers. Three feet 8 inches below that runway was another platform or runway which was an additional 3 feet or so wide complete with a 3 foot 6 inch railing or guard. This was for use by the electricians or other technicians and was not especially built [Tr. pp. 248-249, 251]. The runways, the scaffolding and the guard rail did not, of course, show in the picture.

In the episode, Dardo is shown escaping with Rudi, a small boy. The action on the roof top was only a small part of the scene. In the whole sequence the action shows the rescue of the boy in a crowd in the courtyard by Dardo, during which both Dardo and the boy are thrown over the heads of the crowd. Dardo next runs up a ladder or scaffold on the edge (which collapses after him and is not to be confused with the permanent scaffold or runway at the back) and then up the roof carrying the boy [Tr. p. 202]. This part of the action, which was both difficult and dangerous, was without question performed by Lancaster [Tr. pp. 174, 202-203, 234]. At the peak of the roof, however, though this was not apparent in the photoplay, the sequence changed and the figure, though still apparently the character Dardo carrying the character Rudi, continued in the distance along the crest of the roof. Actually, this was along the prepared path or runway. Rudi, the one being carried, described this runway as

"safe enough for * * * an elephant to walk * * *" [Tr. p. 238]. In this portion of the action as included in the final picture and shown to the public, that is to say, the sequence along the runway, Don Turner was the actual person filmed as representing Dardo. However, Lancaster had done the precise thing first, as a test on rehearsal, and both Rudi, as the character being carried, and the script girl so testified [Tr. pp. 235, 236, 259-260].

There is no question about the facts involved. Lancaster did the difficult and dangerous portion of the sequence and, when it became merely work, his place was taken by Turner. The Trial Court did believe and it did find that the part of the sequence done by Turner in this connection was not a stunt. There is also no contradiction of the testimony showing Lancaster also *had* done even that part of the sequence, whether or not it was a stunt or appeared in the picture, though there is no finding as to this fact.

In contrast with the kind of thing involved in the carrying of the figure of a small boy along an adequately broad pathway, the evidence showed clearly that there had been a great number of very difficult acrobatic feats done by Lancaster personally which would certainly be considered stunts in any definition thereof. The testimony showed that Mr. Lancaster had done great swings on bars many feet above the ground, had walked across an open space many feet above the ground upon a slender pole like a tightrope and had done many leaps, somersaults, falls and other things such as circus acrobats do at times, all requiring boldness, courage, skill and training [Tr. pp. 199-202, 211-216]. On one small episode, where he caught another character at the end of a leap, he had practiced for three weeks [Tr. pp. 199-200].

(b) The Second Episode.

This concerns a courtyard scene in which a horse is ridden by Dardo to a country cart standing beneath a gallows. Dardo stops the horse, steps from it to the cart which is serving as a platform under the gallows, cuts down the figure of a character in the process of being hanged and drives the cart away [Tr. pp. 209-210, 223-224]. Two shots of this scene were done by Turner as Dardo, *i. e.,* in place of Lancaster. There were no high speed leaps from a running horse or anything of that sort. The horse being ridden had stopped and the cart was stationary and had a low bed [Tr. p. 171]. The head of the horse harnessed to the cart was being held, so there could be no movement. It was again merely work and as such performed by Turner as a double for Lancaster. It should be noted that Turner appeared in various scenes when he was not doubling for Lancaster but was merely a horseman or other general character. This was true as to most of the courtyard melee. Turner may have been there but not as Dardo or as a double for Lancaster [Tr. pp. 223-225] and most of the time was on the sidelines [Tr. p. 171].

(c) The Third Episode.

This is a sword fight or duel between the characters Dardo and Alessandro. The Court found that all of this episode was actually performed by Lancaster with the exception of two shots in which the camera shows only the arm and shoulder of the character Dardo. The evidence shows again that Lancaster in fact did the whole sequence [Tr. pp. 215-216, 229], but that the sequence had also been done many other times [Tr. p. 179] and that in the

photoplay the two shots mentioned by the Court were interpolated from one of the other recordings.

The duel in the picture appears to be a violent combat but the evidence also shows how such scenes are made and such explanation shows the episode, including each of the two small shots of Turner's arm and shoulder, is certainly not a stunt. The witnesses Cavens and Turner both testified as to the making of this scene. Cavens is a fencing instructor. He referred to himself as a "motion picture choreographer of fencing" [Tr. p. 229]. Turner was a student of Cavens and also experienced in fencing. The duel scene in actuality differs greatly from actual combat or even competitive fencing. The results are known beforehand and the experts involved in effect study and design the whole affair. The steps, the movements, the blows, the parries, the advances and retreats are all laid out, memorized and practiced in advance in the same way that the choreography of a ballet is established. Each of the duelists knows exactly what the other is going to do, how he is going to do it and when it is to be done [Tr. pp. 176-178].

This scene was designed and laid out by Cavens and Turner, after which they rehearsed it with the actors who were to play Dardo and Alessandro [Tr. pp. 230-231]. Dardo was Lancaster and he actually did and was photographed doing the whole sequence [Tr. pp. 215-216, 229]. In the edited version of the picture as presented to the public, the figure shown as Dardo in that duel is Lancaster with, as noted, two trivial exceptions [Tr. pp. 167, 230, 232-233]. In two shots the camera is so placed to get a full face view of Alessandro over the shoulder of Dardo. Turner was serving almost as a piece of scenery while the camera focused upon the action of Ales-

sandro. Turner was used here in place of Lancaster, as the testimony shows, to save the producer the money and time necessary in having Lancaster do that part of the performance [Tr. pp. 178-179]. Similarly, when the time of the actual performance of the part of Allessandro could be saved, the work was done by Cavens [Tr. p. 229]. There is not the slightest evidence that these substitutions were made because of any risk or particular skill needed for that part of the episode or any particular part of the swordplay.

II.

The Findings As to What Are and What Are Not "Stunts" Are Correct.

Appellant seems to urge that these three episodes were stunts because Don Turner was and is classified as a "stuntman" and "double" in the industry and it was Don Turner who did the specific things herein mentioned. In the portion of Turner's testimony quoted by appellant (Op. Br. p. 15), he apparently wishes to leave the impression that, because Turner received extra pay in connection with these episodes, then therefore they must be stunts. The actual testimony of Turner was that he was always on a stuntman's pay as his basic rate whenever he was working in a studio [Tr. pp. 167, 180]. Any time there was additional work performed or time could be saved by his skill or knowledge, there was an adjustment of salary above the base pay of a stuntman [Tr. pp. 167, 168]. Mr. Turner, for instance, testified that he got a minimum of $100.00 per day for doing fencing [Tr. pp.

168, 180] because it was a skill he had learned. For hazardous work he received $1,000.00 per day [Tr. p. 170]. In the case of the duel, he was on payroll as a fencing instructor for a period of two weeks [Tr. p. 181]. No deduction or inference as suggested by appellant can legitimately be drawn merely from Mr. Turner's classification or salary rates. The contrary conclusion is plain from these facts that the work done by Mr. Turner was not hazardous and required far less effort, nerve and skill than ordinary fencing. This evidence abundantly supports the Trial Court's finding that such routine work is not a "stunt"—daring or otherwise.

Appellant also argues that (Op. Br. p. 36) the picture itself defines a "stunt" and what was daring or dangerous. The fact that there was no actual danger in any of the three episodes in question is perfectly clear—no more danger than walking into the court room, as the Court said [Tr. p. 208], insofar as these parts portrayed by Turner were concerned. But appellant would have it that if it looked hazardous in the picture it was a "stunt." This disregards entirely the fact that any motion picture in its entirety is an illusion. No picture actually moves in a "moving picture." Actors do not really kill each other, even though the villain appears to have been stabbed through the heart. The fact that an actor appears to have received a mortal wound does not make his work necessarily hazardous. Thus what constitutes a "daring stunt" cannot be tested by the apparent danger created through the ordinary practices of the

dramatic arts. Moving along a two-foot runway which would be "safe enough for an elephant to walk on" does not become a stunt, with or without daring, merely because on the screen it looked like the sharp peak of a roof.

Nor should it be overlooked that this is not a case where an ordinary member of the public has been led astray by illusion or looks. The appellant Garrison was himself an actor in the making of that picture, an atmospheric player, as he himself said [Tr. p. 147]. The newsreel, in contrast to the picture, did say that making somersaults from six horizontal bars was a stunt [Ex. 6, Tr. p. 313]. This feat was real and was hazardous and Lancaster did it [Tr. pp. 211-212], whether the bars were 20 feet in the air, as the news release of appellee stated [Tr. p. 308] and as appellant points out (Op. Br. p. 38) or 60 feet as the newsreel indicated. Lancaster spoke in the newsreel about this particular feat, and he also indicated he had been a circus performer. The proper inference—the one drawn by the Trial Court—was "daring stunts" meant acrobatic feats of this kind.

Appellant cites Webster's definition (App. Op. Br. p. 36) and that definition of a stunt as "a feat * * * striking for the skill, strength or the like, required" when applied to any of these episodes gives completely negative results. Riding a horse, stepping to a stationary cart or going along a two-foot runway carrying a child are neither "feats" nor "striking" for any skill, strength or other similar quality.

III.

The Decison That There Was no Contract Between Appellant and Appellee Is Correct and Consistent.

Any contract here must be found in an offer made by or binding on appellee and accepted according to the terms of such offer by appellant before withdrawal. The issues are of fact. The findings are against appellant on all questions and are supported by the evidence. Appellant claims the findings are inconsistent and contrary to the evidence.

(a) The Alleged Offer.

Finding II [Tr. pp. 40-42] first describes the newsreel as filmed. The dialogue therein spoken [Tr. pp. 313-314] by Lancaster or the newspaper reporters certainly does not make an offer. His first words convey the idea that he is counting dollar by dollar a heap of bills containing a million, and that he has done such counting three times. A moment's thought shows that at a dollar a second it would take in excess of three months of eight-hour days to do any such thing. The dialogue does not even mention appellee. It does mention "any producer." The finding then [Tr. p. 42] sets forth the language of the narrator in his introduction, both as furnished by appellee and in the different language as actually given. The Court then finds [Tr. p. 43]:

> "That except as herein found no other offers or purported offers * * * were made or authorized by the defendant * * *"

and then specifically that there had been *no* offer to pay anything to anyone

> "who could prove that said Burt Lancaster did not do or perform all the stunts he was shown doing or purported to perform in said motion picture."

The newsreel text, either as actually given or as supplied by appellee, if construed as an offer, refers only to "his daring stunts" (actual) or "all stunts attested to by the stuntmen who worked in the picture" (supplied). The complaint asserted an offer [Tr. p. 5, Par. VI] referring to "all of the stunts he was shown doing or *purported to perform* in said motion picture." The Court rejected the claim on the facts as to the stunts under the language of the newsreel, which was clearly limited, and by necessary inference found the material appearing in the Los Angeles Mirror was no offer by appellee on any terms. There is no evidence nor is it true that the Mirror was in any way affiliated with or an agent of or controlled by appellee. The language of the item in the paper [Ex. 3, Tr. p. 305] and that of the press release [Ex. 4, Tr. p. 307] are substantially different with reference to the stunts. The actual published item literally means nothing under the language selected by the newspaper, for even without proof it is clear that Lancaster would do all the stunts *"he* is shown doing." Neither version is such as would support appellant's claim. The facts concerning performance have already been presented and it seems clear that the only offer which might help appellant would be one completely unrestricted by any reference to "stunts" but enlarged to state that every time Dardo appeared on the screen it was actually Lancaster and that he had never been doubled in any scene. No evidence of any kind shows the existence of any such offer, nor does

any evidence contradict the Conclusion of the Court [No. 1, Tr. p. 46] that there had not been an offer as alleged nor otherwise than as presented by the newsreel. Much less was there any offer sufficient to support the position of appellant on the proof made.

(b) No Acceptance.

Finding III [Tr. p. 43] is that there was no acceptance of any offer as alleged by appellant [Par. VII, complaint, Tr. p. 5]; Finding IV [Tr. p. 44] is that appellant had not submitted proof in compliance with the alleged offer, and did not perform the conditions of the alleged contract [Finding V, Tr. p. 44].

The evidence as to the claimed acceptance consists of the testimony of each of the participants to two telephone conversations (not three as per Op. Br. p. 8). There is very little essential difference in the versions. The conversations were between Mr. Garrison and Mr. Gordon Files, a member of Freston & Files, attorneys for appellee [Tr. p. 145]. Garrison told Files over the phone that he had seen the newsreel and *"felt sure* I could prove" that Lancaster had not done all of the stunts in the picture [Tr. pp. 146, 151]. He told Files of some of the scenes where "I *thought* that Mr. Lancaster didn't do his own stunts" [Tr. p. 152]. He mentioned that he had talked to Curtis—the midget—and Curtis had admitted Turner carried him upon the roof [Tr. p. 153]. Mr. Files, on his side, testified Garrison had said "he *believed* that he could prove that Mr. Lancaster had not done certain of the stunts" and that he had referred to the roof and rescue scenes [Tr. p. 188; Op. Br. p. 9]. A feeling, a thought or a belief that he could prove anything is far

from the same as proof, and proof was a condition of any of the versions of the asserted offer.

In the second phone conversation three days later, Garrison said he could prove his claim but he did not try to prove it to Files or appellee then or at any time until the trial.

He did tell Files he had a recording of a conversation with one Pomroy, in which it was admitted that it was Turner who had climbed up on the roof [Tr. p. 188] but at the trial he admitted he had no such recording [Tr. p. 154] and, as already shown, it *was* Lancaster who climbed up the roof. He also told Files he had a piece of a Dardo costume worn by Turner but admitted at the trial that he had no such thing [Tr. p. 155].

Mr. Files advised Garrison that he took the position there had been no such offer made but that, if Garrison thought there was, it was withdrawn [Tr. p. 191]. Garrison denied this statement but it was accepted by the Court. About a week later Mr. Marcus, as attorney for Garrison, wrote a letter stating Garrison had advised him, *i.e.,* Marcus, that Garrison *had* accepted the offer and had given proof [Ex. 8, Tr. p. 386] but such letter, of course, added nothing to Garrison's phone calls.

Furthermore, in such conversation, Garrison stated that what he wanted was to get back to New York for the theatrical season, and that if Files would "arrange for Warner Bros. to buy me a ticket to New York and a suit of clothes and some change to put in my pocket I will go to New York" [Tr. p. 189—see also Tr. pp. 190 and 196]

and "forget about it" [Tr. p. 196]. It is submitted, this constitutes a counter offer by Garrison and not an acceptance under any circumstances.

A qualified acceptance or a counter offer is not an acceptance but a rejection, and is really a new proposal.

Cal. Civ. Code, Sec. 1585;

Wristen v. Bowles, 82 Cal. 84 at 87, 22 Pac. 1136;

Tilley v. City of Chicago and County of Cook, 103 U. S. 155, 26 L. Ed. 374.

Although the facts relating to the asserted offer and acceptance in this case seem to dispose of the claim, it is elementary that to have an enforceable contract there must be consideration and, furthermore, there must be a real intent to contract.

In *Briggs v. Miller,* 176 Wisc. 321, 186 N. W. 163, the defendant announced or published an offer that in the event anyone at any time lost money in any of defendant's business ventures and could show the fact, the defendant would immediately pay the full loss sustained. The plaintiff, like the appellant here (Op. Br. p. 31), relied primarly upon the English case of *Carlill v. Carbolic Smoke Ball Co.,* 1 QBD 256 (cited in the opinion as 2 QBD 484) and this early case (1892) is discussed and distinguished by the Wisconsin court. It points out that in the *Carbolic* case the plaintiff, after learning of and in reliance upon the offer or warranty, purchased the device in question and used it as directed but nevertheless the device failed to perform. It is noted that defendant derived a direct benefit from the sale to the plaintiff and

that the same was true in other cases of the same class. In the *Briggs* case itself, the plaintiff did not perform any act relating to the offer other than the mere act of acceptance. Consideration for an offer of reward may often be found in an act such as proof or giving of information but the mere announcement of acceptance is not consideration. We suggest to the Court that the *Briggs* case is far closer in facts and far more persuasive than the *Carbolic* case herein.

Restatement of the Law of Contracts, Section 75, puts it that (subd. b)

> "Consideration must actually be bargained for as the exchange for the promise"

and in subdivision c it is said that

> "The fact that the promisee relies on the promise to his injury or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange; * * *."

a statement of the rule which is quoted in *Bard v. Kent,* 19 Cal. 2d 449 at 452.

In the case at bar, the appellant, in his two phone calls, at the very most, did nothing more than indicate a wish to accept and a belief or feeling that he could at some time or in some way prove in two indicated instances that Lancaster had not done the stunt. This is the type of act directly parallel to that involved in the *Briggs* decision *supra* and contemplated in the authorities mentioned as ineffective.

There must be, of course, as a corollary to and part of the rule with respect to consideration, an intent to contract. As Williston puts it (Williston on Contracts (Rev. Ed.), Sec. 94, Vol. I, p. 297), an offer too good

to be true cannot be snapped up and accepted so as to constitute an enforceable contract (see also *Allensworth v. Allensworth,* 239 Ky. 43, 39 S. W. 2d 198, 202; *Germain Fruit Co. v. Western Union,* 137 Cal. 598, 70 Pac. 658). And, of course, a contract is quite different from an offer to make a gift on a condition, for the latter, though looking much like the former, does not involve the intent to contract and there is no consideration (see *Graves v. Northern New York Publishing Co.,* 22 N. Y. S. 2d 537; Williston, Sec. 94). In the newsreel the dialogue twice refers to the proposal to "give away" the million.

In this connection it is, of course, the intent of the party as evidenced by act or word and not the mental impulse which is involved. It is submitted that the nature of any asserted offer or acceptance here shows there was no such intent. Appellant was himself employed on the picture and in the industry. Confined to the newsreel version, the asserted offer is of an even million dollars for proof that an actor was faking his scenes in a picture. Appellant claims the offer was to anyone who "can prove" that particular thing (App. Op. Br. p. 30), *i.e.,* not a single prize or award, but a million dollars to each claimant and so could be hundreds of times that amount. The fact that the amounts are preposterous should, we believe, be taken into consideration in interpreting the intent of the parties.

Nor is the amount involved the only thing going to the ostensible intent of either party. The newsreel showed Lancaster apparently counting a tremendous heap of money a dollar at a time as evidenced by his repetition of the digits "998-999" etc. He states, furthermore, that he had counted it three times [Ex. 6, Tr. p. 313]. As already noted, little arithmetic shows that to count a million

dollars dollar by dollar and do it three times at one second per unit, eight hours a day, seven days a week, would take in excess of three months. We doubt that appellant could have reasonably accepted any such statement as a fact, or even that the money actually being counted was money being offered. Furthermore, the literal language of the announcer's statement, which alone actually contains anything resembling an offer, must be enlarged by appellant because literally Lancaster would be doing *"his* daring stunts" if there were any of *his* daring stunts in the picture. Language, setting and amount are all, we suggest, such as to cast very serious doubts upon any possible belief of the appellant that there was a true intent to contract under or by reason of the newsreel announcement. When, as already pointed out, appellant demanded a million dollars because he believed or felt he could prove something at some time and in some way and appeared willing [Tr. pp. 189-190] to forget the whole matter for a suit of clothes, a ticket to New York and a few dollars, then the beliefs and intentions of appellant particularly may be seriously questioned.

(c) Revocation.

As heretofore noted and before appellant did anything whatever other than announce his beliefs and feelings over the telephone, he was advised by Mr. Gordon Files on behalf of the appellee that it took the position there had been no offer but, if Mr. Garrison thought there had been, it was then and there withdrawn [Tr. p. 191]. Appellant now argues that it would be impossible to withdraw or revoke an offer except by utilizing the same means in the same manner and to the same extent as for the offer in the first place (Op. Br. pp. 32-33). The authorities cited by appellant clearly show that an offer

made in a certain way may be revoked in the same way, but those authorities do not in any way indicate or even suggest that utilization of the same means is the only way. The cases cited by appellant are a recognition of the effectiveness of an implied notice, that is to say, that a person having seen the original publication would be bound by a subsequent revocation similarly published even though he had never seen or had actual notice of the revocation. The present case does not involve any implied notice whatsoever but direct and personal notice to the appellant that any offer whatsoever was withdrawn. *Shuey v. United States,* 92 U. S. 73, 23 L. Ed. 697, cited by appellant, decides that the implied notice by a similar publication was effective. The case does not involve or consider the possibility of direct personal notice to the claimant. It is the general rule of revocation mentioned in Section 41 of the Restatement rather than the permissive rule mentioned in Section 43 which is here applicable.

The remaining authorities cited by appellant are irrelevant. *Robertson v. United States,* 343 U. S. 711, 96 L. Ed. 1237 (Op. Br. pp. 31-32), is an income tax case in which the claimant had won a prize for the best symphony composed in this country. The symphony had been written in the years 1936 to 1939. The contest commenced in 1946 and the award was made in 1947. The question was the taxability of the prize as income and whether it could be spread over a period of thirty-six months. The District Court had held the award was a gift and not taxable at all. The ultimate ruling was that the payment of a prize to the winner of a contest is not a gift but is payment of a legal obligation. Although the donor of the prize required the composer to transfer a number of rights in the work to a party other than himself, it was

held that the payment was nevertheless for services rendered and would be taxable as such.

Mosley v. Stone, 108 Ky. 492, 56 S. W. 965, to take another example, is a reward case in which the offer was of a sum for the arrest of a fugitive with directions to deliver the prisoner to a specific jail. The claimant found the fugitive but the finding resulted in a gun battle in which the fugitive was wounded. He died before claimant could make physical delivery to the jailer. The ruling of the Court was that the reward was for the difficult and hazardous feat of finding and apprehending the fugitive and this had been performed.

In the first of the above cases a complete symphony had been composed and submitted. In the second case a desperate fugitive had been tracked down and apprehended after a gun battle. There is no parallel to the case here where the act of the appellant was a mere phone call or calls stating he would like the million dollars and believed he could prove certain things.

IV.

The Denial of Costs and Attorneys' Fees Claimed Under Rules 36 and 37(c) of the Rules of Civil Procedure Was Entirely Proper.

In this portion of the appeal, appellant brings up an order of the Trial Court denying his motion for attorneys' fees and costs under Rule 37(c) of the Rules of Civil Procedure [Tr. pp. 69-70]. Appellant in 1951 had requested certain admissions under Rule 36 [Tr. p. 17] and at about the same time requested answers to interrogatories [Tr. pp. 10-11]. The motion under Rule 37(c) referred to the Request for Admissions. Appellant's Opening Brief at page 44 refers to "Interrogatory No. 3." Interrogatory No. 3 and the Request for Admission

No. 3, however, generally refer to the same matter though using different terminology and hence it will be assumed that appellant is actually referring to the third Request for Admissions.

That request was for the appellee to admit that the person who ran along the *edge* of the roof carrying another person was not in fact Burt Lancaster [Tr. p. 18]. That request for that admission was refused [Tr. p. 38]. After the trial, when motion for attorneys' fees and costs was made, and in opposition thereto, Mr. Williams, one of the attorneys for appellee, made affidavit in which he said [Tr. p. 66] that in the long shot running along the crest of the roof it was not Lancaster but that in the shot along the lower edge of the same roof it was Lancaster. This is exactly what the evidence showed and is implicit in the Court's findings. The affidavit is an explanation of what might be meant by the word "edge" of the roof in appellant's third Request for Admissions. Appellant used only the word "edge," and a roof such as here concerned could be considered to have two edges, that is to say, the lower and the upper, the upper being usually referred to as the crest or peak. As the affidavit shows, it was not realized for some time that there were two such possibilities. Appellant cannot now attempt to give his own definition of what he meant by the word "edge' 'and, unless he is permitted to supply a definition now suiting his purposes, there is and was nothing in the answer of appellee to either the interrogatory or the Request for Admission which was false in any degree. Nor in any case was the matter of substantial importance, since the whole roof sequence Lancaster did do the stunts and the Court so found.

The appellant on this aspect cites two cases (Op. Br. p. 44), neither of which are related to the facts here. *Modern Food Process Co. v. Chester Packing etc. Co.,* 30 Fed. Supp. 520, simply describes the processes made available by Rules 36 and 37. Its only value here is the remark of the Court that Rule 37(c) permits a penalty in the discretion of the Court. *Metropolitan Life Insurance Co. v. Everett,* 15 F. R. D. 498, again merely describes the process and indicates that the time for making a motion under the rules in question is after proof of falsity has been established at the trial. The case does not touch any fact or issue here.

In conclusion, it is submitted that appellant has shown no reason whatever in fact or in law why the findings and judgment of the Court below are not correct or any reason why this Court should reverse either the judgment or the order below.

Respectfully submitted,

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